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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 738

JOSEPH W. HART, LUELLA F. HART AND J. CARL RUSSELL, PETITIONERS

v.

FEDERAL RESERVE BANK OF ATLANTA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 35-44) is reported at 270 F. Supp. 296. The opinion of the court of appeals (Pet. App. 31-34, as corrected) is reported at 379 F. 2d 961.[1]

[1] A portion of the district court proceedings in an earlier case relied on herein is reported as *United States* v. *Hart*, 215 F. Supp. 35 (M.D. Tenn.), affirmed, 312 F. 2d 127 (C.A. 6). The Findings of Fact and Conclusions of Law in the

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1967. A petition for rehearing was denied by order of July 20, 1967. The petition for a writ of certiorari was filed on October 18, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in this suit against a Federal Reserve Bank, petitioners may retry issues specifically litigated and decided in an earlier case brought against them by the United States, *viz*, that the sale of collateral of which they here complain was made in good faith and for a fair price, and that petitioners had voluntarily entered into an agreement providing for that sale.

2. Whether, in any event, petitioners are barred from bringing this suit by the passage of 17 years between the accrual of any cause of action and the commencement of this suit.

STATEMENT

In 1942, during the early days of the Second World War, Mobile, Alabama, served as a substantial war production center, and a serious shortage of housing

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earlier case are reproduced in the appendix filed with the court below in the present case, at pp. 57bb-62bb, the memorandum opinion at pp. 49bb-54bb. One of the related cases arising out of the transaction at bar is reported as *Hart* v. *First National Bank of Birmingham*, 373 F. 2d 202 (C.A. 5).

for war workers in the area developed. Petitioners[2] formed a corporation for the purpose of constructing a housing subdivision to fill the need for housing. On application by a local bank, accompanied by a signed agreement between it and petitioners' corporation reflecting the fact that no loan would be made unless guaranteed by the War Department, the construction financing was guaranteed by the Federal Reserve Bank of Atlanta as fiscal agent of the War Department.

The corporation encountered considerable difficulty, and on two occasions the loan and guarantee were increased. The second increase in financing, in October 1943, included petitioners' personal unconditional guarantee of the corporate note, their pledge of the corporate stock to the banks making the loan, and an agreement by the War Department "through the Federal Reserve Bank of Atlanta as fiscal agent of the United States" (20bb-21bb) to purchase, upon demand of the banks, 90% of the unpaid balance of the corporate note guaranteed by petitioners.

By April 1944, the corporation was insolvent and the note was in default.[3] On April 6, 1944, petition-

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[2] Mrs. Hart, a named petitioner herein, was found by the district court not to be a proper party plaintiff. *Hart* v. *Federal Reserve Bank of Atlanta*, 270 F. Supp. 296, 298. That holding was not contested on appeal. Consequently the term "petitioners" is used herein to describe Messrs. Hart and Russell.

[3] A portion of the factual background of this case is set forth in *Hart* v. *First National Bank of Birmingham*, 373 F. 2d 202 (C.A. 5), another of the series of cases which petitioners have instituted against various defendants.

ers entered into an agreement with the banks, by which they conveyed all the stock of the corporation to the banks, free and clear, in return for the banks' promise to forbear enforcement of their rights against petitioners as guarantors of the defaulted note for one year. If the banks exercised their power to sell the corporate stock or assets free and clear of petitioners' claims within a year, petitioners were to be given a thirty-day option to acquire the property on the same terms. Petitioners were also given an opportunity to pay the corporate indebtedness within a year, either by themselves or through the corporation (of which they remained managers), and thus regain the stock held by the banks. Petitioners agreed that, at the end of the one year period, they would have no further rights of any nature to the stock or assets of the corporation.

In September 1944, the banks exercised their right to demand that the War Department honor its guarantee of 90% of the unpaid balance of the loan, which by then had been reduced substantially as other mortgages had been placed on the homes. The War Department paid that amount to the Federal Reserve Bank of Atlanta in October 1944, and the Federal Reserve Bank in turn paid the money to the mortgagee banks. The latter assigned their rights to the Federal Reserve Bank of Atlanta as agent of the War Department, but continued to act as administrators of the loan.

The note remained in default for the one year period following April 6, 1944, and petitioners did not regain the stock. Thereafter, the real property assets

of the corporation [4] were sold as a whole to an outside purchaser. That sale produced $37,170 in cash, which, along with the remainder of the corporate assets, was utilized to reduce the corporation's liability on its note, and consequently the liability of petitioners as guarantors, by $49,919.97. The United States made demand upon petitioners for payment of the amount due under their guarantee on November 19, 1952.

When no payment was forthcoming by late 1956, the United States instituted suit against petitioners to recover the amount due on their guarantee. Petitioners defended that suit on the grounds, *inter alia*, that the corporate assets were sold below value, and that this constituted a misapplication of collateral which released them as guarantors, and further that they had been coerced into entering the agreement of April 6, 1944. The district court rejected those defenses, finding that the agreement of April 6 had been entered into voluntarily by petitioners, and that it had been primarily for their benefit. As to the contention that the sale had been for less than fair value, the court found that the evidence offered by petitioners to prove that defense was "entirely unconvincing and, when considered in its entirety, refutes rather than substantiates this contention." [5] (50bb). Thus

[4] Which had been assumed by a successor corporation.

[5] The evidence offered by petitioners in that case was summarized by the district court at some length (50bb-51bb), and was clearly sufficient to show that there was no fraud and that the sale was fair.

it found the sale to be for a fair and equitable amount (61bb). On petitioners' motion to file an amended answer, the court reiterated those findings. *United States* v. *Hart*, 215 F. Supp. 35 (M.D. Tenn.). The judgment in favor of the United States was affirmed on appeal. *United States* v. *Hart*, 312 F. 2d 127 (C.A. 6).

On November 6, 1962, while the appeal in the suit brought by the United States was pending, petitioners brought this action against the Federal Reserve Bank of Atlanta, seeking recovery of the value of "their" stock in the corporation at the time of the sale, less the amount received in the sale, together with interest. The allegations were essentially the same as those comprising the affirmative defenses in the earlier suit.

The Federal Reserve Bank affirmatively pleaded that (1) Mrs. Hart was not a proper party plaintiff, (2) all matters in controversy were *res judicata* as a result of the earlier action, and (3) the action was barred both by the relevant statutes of limitations and the doctrine of laches. The Federal Reserve Bank moved for summary judgment, and the district court granted that motion, finding that petitioners were collaterally estopped to relitigate the issues that had been determined against them in the prior case. *Hart* v. *Federal Reserve Bank of Atlanta*, 270 F. Supp. 296 (M.D. Tenn.). The court of appeals affirmed, finding itself in complete agreement with the district court's opinion, and holding, in addition, that there was no merit to petitioners' contention that the Federal Reserve Bank had not been authorized to en-

ter into the guarantee of the loan for which petitioners had applied. *Hart* v. *Federal Reserve Bank of Atlanta*, 379 F. 2d 961 (C.A. 6).

ARGUMENT

The decision below is clearly correct and there is no occasion for further review by this Court.

1. The only issue not raised and decided against petitioners in the earlier suit is their contention that the Federal Reserve Bank of Atlanta was without authority to participate in the transactions. But it is plain that the bank was authorized to act as agent for the War Department to guarantee any contract found by the War Department to be "necessary, appropriate or convenient for the prosecution of the war" and that the War Department was entitled to use for such purposes any funds available for expediting production of material, equipment, or supplies.[6] This authority was specifically granted by Executive Order No. 9112, 7 Fed. Reg. 2367 (Pet. App. 52-56), which was authorized under the First War Powers Act, 55 Stat. 838 (Pet. App. 46-49). Executive Order No. 9112 specified that, when a Federal Reserve Bank participated in any commitment as agent for the War Department, "no Federal Reserve Bank shall have any responsibility or accountability except as agent of the War Department * * *." 7 Fed. Reg.

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[6] Indeed, petitioners would seem to be estopped to challenge the authority of the Federal Reserve Bank and the War Department to grant the guarantee for which they themselves had applied.

2368 (Pet. App. 55). On June 11, 1942, Congress passed a bill which specifically authorized the War Department to make loan guarantees in accordance with Executive Order No. 9112. See Section 7, 56 Stat. 351 (Pet. App. 58). That provision was inserted specifically "to give legislative approval to the exercise of authority under Executive Order No. 9112," H. Rep. No. 2131, 77th Cong., 2d Sess., 5; 88 Cong. Rec. 4506.

The Federal Reserve Bank entered into the guarantee agreement in compliance with the procedures set out in Regulation V (7 Fed. Reg. 2773) of the Board of Governors of the Federal Reserve System; the Bank did not execute the guarantee until it received the required certificate of convenience and necessity from the War Department.[7] Thus the Bank was lawfully involved in the transaction.

2. Petitioners' remaining contentions have been litigated before and the courts below were correct in ruling that there was no need to re-examine them. Since the Federal Reserve Bank of Atlanta was acting as agent of the United States in entering into the contracts at bar, it is plain that the Bank is entitled to rely on collateral estoppel as a defense to this action.[8] Petitioners have litigated the issues of the

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[7] This document, together with copies of the application for a War Department guaranteed loan by petitioners' corporation, was furnished to the court of appeals at the instance of counsel for petitioners.

[8] Even if the Federal Reserve Bank had not been acting as agent of the United States, petitioners would be bound by the determination of the pivotal issues in this case against

fairness of the sale of the corporate property and the adequacy of the price therefor, and lost. Petitioners in the past have had ample opportunity to prove the "fraud" they seek to demonstrate in this action; their proof has been found to be "entirely unconvincing" and to refute rather than substantiate their contentions. They are not entitled to try to revive these claims in this suit. See *Lawlor* v. *National Screen Service*, 349 U.S. 322, 326. Thus, as the courts below found, no action for damages could be maintained, since it had been determined in the prior action that there were no damages.[9]

3. In any event, although the courts below found it unnecessary to reach this question, it seems apparent that this action is barred by the statute of limitations. Petitioners' cause of action, if any, accrued no later than the sale of the corporate property in 1945. *Hart*

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them in the prior action. See, *e.g.*, *Bruszewski* v. *United States*, 181 F. 2d 419 (C.A. 3), certiorari denied, 340 U.S. 865; *Zdanok* v. *Glidden Co.*, 327 F. 2d 944 (C.A. 2), certiorari denied, 377 U.S. 934; *Graves* v. *Associated Transport, Inc.*, 344 F. 2d 894 (C.A. 4); *Davis* v. *McKinnon & Mooney*, 266 F. 2d 870, 873 (C.A. 6).

[9] The allegation (Pet. 10-16) that the sale was unfair because the entire subdivision was sold at once is, in addition to being raised for the first time in this Court, wholly without merit. Petitioners' complaint in this action demonstrates that the buyer of the property did not complete the sale of the individual homes until 1957. (Pet. 13). Individual sales by the banks would plainly have been an inappropriate method of liquidation of collateral. Further, the district court in the prior case specifically found the sale to be fair and equitable. Petitioners cannot here rely on their failure to raise a legal theory in the prior action.

v. *First National Bank of Birmingham*, 373 F. 2d 202, 205 (C.A. 5), and thus is plainly barred under any possibly applicable statute of limitations.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1967

[10] Demand by the United States on petitioners for payment is shown by the record herein to have been made on November 19, 1952, almost 10 years prior to the filing of this action on November 6, 1962.

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